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Tara Scott et al., Order on Plaintiffs' Motion to Dismiss Counterclaims

Elizabeth E. Long
Fulton County Superior Court

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

TARA SCOTT; BAILEY M. CARTER; and)	
WILSON CARTER, Individually, as Trustee)	
of THE WILSON M. CARTER 1988)	Civil Action
TRUST, and as Next Friend of MARY)	File No. 2017CV297083
WILSON CARTER,)	
)	
Plaintiffs,)	
)	Bus. Case Div. 2
v.)	
)	
JOHN J. CARR and)	
JOHN MATTHEW DWYER, III,)	
)	
Defendants.)	

ORDER ON PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS

The above styled matter is before the Court on Plaintiffs' Motion to Dismiss Defendant John J. Carr's Counterclaims ("Motion to Dismiss"). Having considered the pleadings, the Court finds as follows:

SUMMARY OF RELEVANT PLEADINGS

In this action Plaintiffs allege Defendants John J. Carr and John Matthew Dwyer violated state and federal securities laws and committed other torts when they solicited and sold Plaintiffs shares in Vantage Corporation ("Vantage"). Plaintiffs assert that at the time they were sold the Vantage shares: the stock was not a federal covered security, was not subject to an effective registration statement and was not exempt from registration; Defendants received direct or indirect compensation for their role in soliciting investments in Vantage but were not registered as securities salespeople or as investment advisors; and Defendants made misleading statements

of material fact or omissions when soliciting and selling shares to Plaintiffs causing Plaintiffs to suffer damages.

In his answer to Plaintiffs' Second Amended Complaint, filed Aug. 13, 2018, Defendant Carr asserts a counterclaim against Plaintiffs Tara Scott and Wilson Carter that includes claims for breach of contract and breach of fiduciary duty. The breach of contract claim is specifically directed against Scott. Carr asserts that on Oct. 24, 2016, Scott executed a Stock Transfer, Power of Attorney to Transfer Stock and Release Agreement ("Stock Transfer Agreement").¹ Therein Scott assigned and transferred to David F. Lawrence 119.240675 shares of her Vantage stock and appointed the President of Vantage to transfer the stock on the company's books. Carr contends Scott breached a release provision contained in the Stock Transfer Agreement by filing this action against him.

With respect to the breach of fiduciary duty claim, Carr previously asserted that, to the extent the Court finds the parties agreed to be partners, Scott and Carter breached their fiduciary duties and implied covenants of good faith, fair dealing, and loyalty by: failing to disclose information and not providing accurate information; not acting in Carr and the partnership's best interests; making misrepresentations and omissions of facts and events; and misusing superior knowledge, among other allegations. However, in his Second Amended Answer to Plaintiffs' Second Amended Complaint and Counterclaim, filed on Oct. 29, 2018, Carr abandoned the breach of fiduciary duty claim, leaving only the breach of contract claim against Scott.

¹ Defendant John J. Carr's Second Amended Answer to Plaintiffs' Second Amended Complaint and Counterclaim, Ex. K (Stock Transfer Agreement). See Hendon Properties, LLC v. Cinema Dev., LLC, 275 Ga. App. 434, 435, 620 S.E.2d 644, 647 (2005) ("[A] trial court may properly consider exhibits attached to and incorporated in the pleadings in considering a motion to dismiss for failure to state a claim for relief") (citing Bakhtiarnejad v. Cox Enterprises, 247 Ga. App. 205, 208(1), 541 S.E.2d 33 (2000)).

ANALYSIS

I. Standard on a Motion to Dismiss

A motion to dismiss brought under O.C.G.A. §9-11-12(b)(6) for failure to state a claim upon which relief may be granted should not be sustained unless:

(1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought...

Austin v. Clark, 294 Ga. 773, 774–75, 755 S.E.2d 796, 798–99 (2014) (citing Anderson v. Flake, 267 Ga. 498, 501(2), 480 S.E.2d 10 (1997)); Abramyan v. State, 301 Ga. 308, 309, 800 S.E.2d 366, 368 (2017), reconsideration denied (June 5, 2017). “When the sufficiency of the complaint is questioned by a motion to dismiss for failure to state a claim for which relief may be granted, the rules require that it be construed in the light most favorable to the plaintiff with all doubts resolved in his favor even though unfavorable constructions are possible.” Cobb Cty. v. Jones Grp. P.L.C., 218 Ga. App. 149, 152, 460 S.E.2d 516, 520 (1995) (citing Time Ins. Co. v. Fulton–DeKalb Hosp. Auth., 211 Ga. App. 34, 35, 438 S.E.2d 149 (1993)).

II. Analysis and Conclusions of Law

A. Breach of Contract Claim

In his counterclaim Carr alleges Scott breached the Stock Transfer Agreement by filing this action against him in violation of the release contained in the agreement. Plaintiffs urge Carr fails to state a claim for breach of contract because the Stock Transfer Agreement only concerned the 119.240675 Vantage shares she transferred thereunder, not the remaining shares of Vantage stock she continues to own and which are the subject of her claims in this action and, in particular, her prayer for rescission.

In Georgia,

[a] release or settlement agreement is a contract subject to construction by the court. It is governed by state law applicable to contracts in general. The cardinal rule of construction is to determine the intention of the parties. Where the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties. Such a contract is the only evidence of what the parties intended and understood by it.

Tisdale v. Westmoore Grp., LLC, 341 Ga. App. 445, 448, 800 S.E.2d 624, 627–28 (2017) (quoting UniFund Financial Corp. v. Donaghue, 288 Ga. App. 81, 82, 653 S.E.2d 513 (2007)). See also Kinard v. Worldcom, Inc., 232 Ga. App. 278, 279, 500 S.E.2d 649, 650 (1998) (“It is well established that where the terms of a written release are clear and unambiguous, the court will look to the release alone to find the intention of the parties”). “The fact that the scope of the [release] is broad does not make [it] ambiguous.” Rice v. Huff, 221 Ga. App. 592, 593, 472 S.E.2d 140, 142 (1996) (citing Citadel Corp. v. Sun Chem. Corp., 212 Ga. App. 875, 876(2), 443 S.E.2d 489 (1994)).

Here, the Stock Transfer Agreement identifies and defines the subject “Shares” as 119.240675 shares of the Class __ Common Stock, \$.0001 par value, of Vantage Corporation standing in Transferor Tara M. Scott’s name on Vantage’s books represented by Certificate No. A-0020.² The Stock Transfer Agreement includes a release that provides in part:

For and in consideration of the promises, covenants, and warranties contained herein...[Tara M. Scott] does hereby release, remise, acquit and forever discharge [Vantage Corporation] and each of [Vantage Corporation]’s successors, assigns, affiliates, *and their respective past and present officers, directors, agents, servants, employees*, and attorneys (the “Releasees”), *from any and all* rights, demands, claims, damages, losses, costs, expenses, actions and causes of action whatsoever, *including but not limited to claims arising under the Shares*, including claims in tort or in contract, at law or in equity, known or unknown, contingent or fixed, suspected or unsuspected. [Tara M. Scott] understands and agrees that by signing this agreement [she] is *giving up rights, if any, which*

² Id.

[she] may have under federal, state, or municipal law, and is hereby covenanting not to file complaints or lawsuits or to assert any claims against Releasees arising thereunder.

(Emphasis added).

The Court finds the Stock Transfer Agreement did not simply release claims related to the transferred Shares as asserted by Plaintiffs. Notably, the release language does not contain any limitations narrowing the scope or the specific types of claims being released. Rather, Scott released “any and all” rights, claims, actions, and causes of action, including “but not limited to” the transferred Shares. Given this broad but unambiguous language, Carr has at least stated a claim for breach of Stock Transfer Agreement. Thus, Plaintiffs’ Motion to Dismiss Carr’s breach of contract counterclaim is hereby DENIED.

B. Attorney’s Fees and Litigation Expenses Related to Breach of Contract Claim

Plaintiffs also urge that Carr fails to state a claim for attorney’s fees and expenses of litigation with respect to the breach of contract counterclaim because the Stock Transfer Agreement does not include any provision for the recovery of such fees and Carr has not specially pled the statutory grounds for the recovery of attorney’s fees and expenses under O.C.G.A. §13-6-11. In response, Carr acknowledges there is no Georgia authority specifically holding that attorney’s fees and litigation expenses are necessarily recoverable as damages for breach of a release agreement and notes the split in authority among other jurisdictions on this issue. *See Sun Life Assurance Co. of Canada v. Imperial Premium Fin., LLC*, 904 F.3d 1197, 1225 (11th Cir. 2018) (“In at least some jurisdictions, an action filed in violation of a contract not to sue may under certain circumstances—which vary by jurisdiction—permit a suit for breach, with the measure of damages usually being the attorney’s fees and costs incurred in defending against the claim that was precluded”; collecting cases from jurisdictions that allow

such claims and others that “take a different approach”). However, Carr argues Scott’s breach of the Stock Transfer Agreement has caused him to incur attorney’s fees and litigation expenses in defense thereof and, thus, are “part and parcel” of the damages required to compensate him for Scott’s breach of the agreement. The Court is not persuaded.

“The general rule in our legal system is that ‘parties are responsible for their own attorney fees and that an award of fees is an exception to this rule.’” Pipe Sols., Inc. v. Inglis, 291 Ga. App. 328, 329, 661 S.E.2d 683, 685 (2008) (citing Dept. of Transp. v. Ga. Television Co., 244 Ga. App. 750, 753(1), 536 S.E.2d 773 (2000)). Indeed, under Georgia law “[t]he expenses of litigation generally shall *not* be allowed as a part of the damages” in a lawsuit. O.C.G.A. §13–6–11 (emphasis added). Thus, it is well settled that “[i]n Georgia, ‘attorney fees are not generally recoverable as damages absent an *express* provision in a contract or a statutory mandate.’” Doss & Assocs. v. First Am. Title Ins. Co., 325 Ga. App. 448, 464, 754 S.E.2d 85, 98 (2013) (quoting George L. Smith, etc. v. Miller Brewing Co., 255 Ga. App. 643, 644, 566 S.E.2d 361 (2002)) (emphasis in original). See Georgia Subsequent Injury Tr. Fund v. Muscogee Iron Works, 265 Ga. 790, 790, 462 S.E.2d 367, 368 (1995); Money v. Thompson & Green Mach. Co., 155 Ga. App. 566, 566, 271 S.E.2d 699, 700 (1980); Bowers v. Fulton Cty., 227 Ga. 814, 815, 183 S.E.2d 347, 347–48 (1971); Bankers Fid. Life Ins. Co. v. Oliver, 106 Ga. App. 305, 307, 126 S.E.2d 887, 890 (1962). See also

Given the above binding authorities, insofar as the Stock Transfer Agreement does not contain any provision expressly authorizing the recovery of attorney’s fees and litigation expenses for breach of the agreement, and whereas Carr has not pled any statutory basis or other binding legal authority which would permit the recovery of same, any claim for such fees and expenses as a measure of Carr’s damages is hereby DISMISSED.

C. Breach of Fiduciary Duty

Insofar as Carr amended his counterclaim to withdraw the cause of action against Scott and Carter for breach of fiduciary duty, Plaintiffs' Motion to Dismiss that claim is hereby DENIED as moot.

III. Conclusion

Plaintiffs' Motion to Dismiss Defendant John J. Carr's Counterclaims is hereby GRANTED in part and DENIED in part as set forth above.

SO ORDERED this 9th day of November, 2018.



ELIZABETH E. LONG, SENIOR JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

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